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No. 588

In the Supreme Court of the United States

OCTOBER TERM, 1960

EDNA G. RANDALL, ADMINISTRATRIX OF THE ESTATE OF FRANCIS E. RANDALL, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was written by the district court. The opinion of the court of appeals is reported at 282 F. 2d 287, and appears as Appendix A (pp. 1a–12a) to the petition for certiorari. An earlier opinion, withdrawn by the court *sua sponte*, appears as Appendix B (pp. 13a–19a).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (Pet. 12a). A petition for rehearing *en banc* was denied on September 19, 1960. The

petition for a writ of certiorari was filed on December 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below were correct in refusing to write into Section 27 of the Federal Employees' Compensation Act—which provides that a beneficiary who receives workmen's compensation benefits under the Act from the United States and also receives an additional award or settlement for the same accident from a third-party tortfeasor "shall refund to the United States the amount of compensation which has been paid by the United States"—the limitation that the obligation to refund arises only in those situations in which the third-party tortfeasor was exclusively or solely liable for the accident.

STATUTES INVOLVED

Section 201(b), Federal Employees' Compensation Act, as amended, 63 Stat. 861, 5 U.S.C. 757(b):

> The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under

any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.

Section 26, Federal Employees' Compensation Act, 39 Stat. 747, as amended, 5 U.S.C. 776:

If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary; and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future pay-

ments of compensation payable to him on account of the same injury.

Section 27, Federal Employees' Compensation Act, 39 Stat. 748, 5 U.S.C. 777:

> If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:
>
> (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.
>
> (B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury.

STATEMENT

Petitioner is the former widow of Francis E. Randall, a federal employee, whose death occurred when he was a passenger on an airplane owned by Eastern Air Lines, Inc. (Eastern), which, in 1949, collided with a Bolivian fighter plane while both planes were attempting to land at the Washington National Airport. The present proceeding arises out of the wrongful death action petitioner filed in the District Court for the District of Columbia against Eastern and other individuals. The United States was not named as a defendant; petitioner's complaint did not raise the question of any negligence on the part of the United States;[1] nor was there any judicial determination of negligence on the part of the United States in the present case.[2]

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[1] The complaint has not been reprinted, but appears in the original record in the case.

[2] During the litigation, Eastern moved, on October 6, 1953, for leave to implead the United States as a third-party defendant, and attached its proposed third-party complaint. Neither the motion nor the third-party complaint was reprinted, but they appear in the original record. In that complaint, Eastern asserted that the accident was caused by the negligence of the Government control tower operators at the airport, and claimed indemnity or contribution from the United States. Petitioner filed an opposition to the motion on October 12, 1953; by stipulation filed on March 19, 1954, the motion was held in abeyance pending the outcome of other litigation brought in the district court by executors of two other passengers killed in the same accident (the *Miller* cases where the Government was adjudicated as negligent with respect to non-employees). Neither petitioner's opposition to the motion nor the related stipulation has been reprinted, but they also appear in the original record. No ruling has ever been entered with respect to the motion to implead the United States.

Petitioner's suit against Eastern was ultimately settled for $37,500 (J.A. 2, 6, 20).[3] Prior to payment of this amount, the United States advised Eastern's counsel that it claimed a lien in the sum of $17,165.50, which had been paid to petitioner as compensation under the Federal Employees' Compensation Act (J.A. 5). Eastern then filed a petition for authority to pay the $37,500 into the registry of the court (J.A. 2–3), on the ground that it could not safely pay the amount of the settlement to anyone.

Petitioner, in its answer, opposed Eastern's petition, (J.A. 6–7), as well as the Government's petition to enforce its lien (J.A. 8, 21), by which the United States for the first time became a party to these proceedings.

Both petitioner and the United States then moved for summary judgment (J.A. 23). The district court denied petitioner's motion and granted that of the United States, ordering payment to the United States of the sum of $17,165.50 (J.A. 24).[4]

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[3] "J.A." refers to the Joint Appendix printed for use in the court of appeals. Petitioner states that Eastern's payment of $37,500 may represent what Eastern felt was properly owing, in addition to the compensation payment of over $17,000 by the United States (Pet., p. 11, fn. 3). More correct is petitioner's contrary suggestion that the United States had contributed to the $37,500 paid in settlement of the case by Eastern (see par. 2 of petitioner's Answer to the Petition of the United States of America to Enforce Lien, J.A. 22), which it did as part of the overall settlement with most of the representatives of those who died in the crash.

[4] Since there had been no conflicting claims to the remaining $20,334.50, that sum had been paid out earlier by order of the court (J.A. 20).

On appeal, the court below issued two opinions. The first opinion (Pet. App. B, pp. 13a–19a), in which the court reversed the judgment of the district court on a ground not specified as error by petitioner in the court of appeals and for that reason never briefed by the parties prior to appeal, was subsequently withdrawn by the court *sua sponte* (Pet. App. B, p. 19a).[5]

The second opinion (Pet. App. A, pp. 1a–12a), to which the petition for certiorari is directed, in effect affirmed the district court's ruling requiring reimbursement to the United States for its outlay of compensation under the Federal Employees' Compensation Act. Relying on this Court's opinion in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411–412, and on the specific language of Section 27 of the Compensation Act, the court below found nothing in the Act to suggest that the negligence of one Government employee which contributes to an accident to another Government employee might excuse a beneficiary from reimbursing the United States out of the money re-

[5] The first opinion was based on the theory that reimbursement under the Act was not allowable because petitioner had appeared, not in her capacity as widow (in which capacity she had been paid the compensation), but rather in her capacity as administratrix of her decedent's estate. The court reasoned that, since petitioner, as widow, never had a claim against Eastern, the Government had no valid claim for reimbursement from the funds established by Eastern. It suggested also that debts of the decedent's estate might exhaust the fund, so that petitioner, as widow, might ultimately recover none of it. The explicit terms of the Wrongful Death Act of the District of Columbia provide a full answer to this position (see footnote 7, *infra*).

ceived "in satisfaction of the liability of [an]other person" (Pet. App. A, p. 3a).[6] Accordingly, the court remanded the case for further proceedings to determine, *inter alia*, the widow's share of the fund.[7]

ARGUMENT

The decision below accords strictly with the language of the Federal Employees' Compensation Act and with the purposes of the Act as shown in its legislative history. The decision follows a similar ruling of this Court under comparable provisions of the Longshoremen's and Harbor Workers' Compensation Act, and its denial of double recovery to petitioner is in conflict with no decisions of any court, federal or state, under any compensation act. Since, then, the courts below have correctly interpreted Section 27 of the Act, and, since petitioner herself recog-

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[6] In his dissent (Pet. App. A, pp. 3a–12a), Judge Miller read the reimbursement provision of the Compensation Act as though it had been amended to be applicable when an injury or death "* * * is caused by the sole negligence of some person other than the United States" (Pet. App. A, p. 11a).

[7] The court observed that the wrongful death statute of the District of Columbia, under which the suit against Eastern was brought, expressly prohibited the expenditure, for any debts or liabilities of the decedent's estate, of any of the money recovered by an administrator in such an action (D.C. Code 16–1203), and specifically reserved the amount of recovery for distribution "to the spouse and next of kin * * *" (D.C. Code 16–1201) (Pet. App. A, p. 2a). The court thereupon held the reimbursement provisions of the Federal Employees' Compensation Act applicable to the money recovered from Eastern, but only to the extent that the reimbursement did "not exceed the widow's share of Eastern's payment" (Pet. App. A, p. 3a).

nizes that this case is entirely unique,* further review by this Court is unwarranted.

1. The decision of the court below that the United States is entitled to reimbursement of its compensation outlay is clearly required by the language of Sections 26 and 27 of the Compensation Act.

a. The primary impetus for passage of the Federal Employees' Compensation Act was the need for the elimination of negligence as a consideration with respect to the United States and its employees who were injured or killed in the course of their employment. The aim of the legislation was to provide a comprehensive system of "simple, certain, and uniform com-

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* In arguing in her reply brief in the court below (at pp. 8–9) that her position does not involve "destruction of the legislative policy against litigation of negligence", petitioner stressed heavily the uniqueness of this case's circumstances, saying:

> That previous determination [*i.e.*, the determination of negligence in the *Miller* cases (see footnote 2, *supra*)], which was rendered outside the realm of the Compensation Act, represents the truly *unique* aspect of this case, an aspect which is not likely to be repeated except in identical circumstances involving multiple deaths in a single accident where a test case as to the Government's negligence is prosecuted by someone other than a federal employee. To recognize the *unique* fact as to the Government's negligence in this instance is not to permit the question of negligence to be litigated in any manner or any forum differing from what occurred here. In short, we are dealing here with an acknowledged act of negligence rather than with an effort to litigate that question. [Emphasis added.]

The certiorari petition itself, in its statement that "[n]ever before has it been necessary to determine" the problem presented here, under an Act that is 45 years old, highlights the unusual nature of the case (Pet., p. 7).

pensation" for injuries, which would take the place of costly and wasteful litigation. *Johansen* v. *United States*, 343 U.S. 427, 440–441; *Patterson* v. *United States*, 359 U.S. 495.* Accordingly, a "sole statutory avenue to recover from the Government for tortious injuries received in Government employment" was established to provide compensation regardless of fault. *Johansen* v. *United States*, *supra*, 343 U.S. at 433.

The statutory scheme covering circumstances in which a third party tortfeasor may be liable for a compensable injury or death is a simple one. The Government may require the employee or his beneficiary to assign his cause of action against the third party to the Government, or it may require him to sue the third party. If the beneficiary refuses to assign or prosecute, he is not entitled to compensation. If he assigns, and the United States recovers

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* The legislative history of the Act makes clear that the proponents of the measure were determined to avoid any of the common law concepts of negligence, contributory negligence, assumption of the risk, and the fellow-servant rule. For proceedings in the House of Representatives, see 53 Cong. Rec. 10885–10976 (particularly the remarks of Mr. Sherley, p. 10896; Mr. Hamill, p. 10898; Mr. Borland, p. 10898; Mr. McKenzie, p. 10899; Mr. Cullop, p. 10903; and Mr. Keilly, p. 10904). For Senate proceedings, see 53 Cong. Rec. 12166, 12167, 12887–12902 (especially the remarks of Senator Husting, p. 12896, and Senator Hughes, p. 12889). The Senate and House Reports stressed the complete elimination of fault or negligence as a consideration under the Act, and the compelling need for certainty in payment for all accidents or injuries occurring during the course of employment, even though the level of payments might be relatively low. See S. Rep. No. 515, 64th Cong., 1st Sess., pp. 4, 7; H. Rep. No. 561, 63d Cong., 2d Sess., pp. 26, 27.

through suit or compromise, it retains the amount of compensation paid or payable, and, after deducting its costs, it must pay the surplus to the beneficiary. Section 26 of the Act, 5 U.S.C. 776, *supra*, pp. 3–4. Had this procedure been followed in the present case, and had the United States recovered $37,500 from Eastern, the United States would have paid to petitioner only the balance left after deduction of the compensation and the costs of collection.

The statutory scheme produces a similar result where the beneficiary sues or settles with the third party. The beneficiary is first permitted to deduct from his total recovery the costs of suit and a reasonable attorney's fee. He must then "apply the money * * * so received in the following manner: (A) If his compensation has been paid * * * he shall refund to the United States the amount of compensation which has been paid * * *." Section 27 of the Act, 5 U.S.C. 777, *supra*, p. 4. This language is stated in mandatory terms and makes no exception for negligence. Nor does it in any way limit the Government's right to reimbursement to those situations where a third party tortfeasor is solely liable for the injuries or death sustained by the federal employee.

b. Petitioner attempts to achieve a double recovery here by retention of the full recovery from Eastern, as well as the compensation outlay from the United States. Her contention that such double recovery is not precluded because the United States was negligent in effect requires that the language of the Act, "under circumstances creating a legal liability upon some person other than the United States to pay

damages therefor * * *," be read as if it had been amended to read, "under circumstances creating a legal liability *solely* in some person other than the United States * * *." See the dissenting opinion of Judge Miller quoted in footnote 6, *supra*. But the terms of the Act, as written by Congress, require reimbursement of the compensation outlay completely without regard to whether the United States might have been negligent.

Since fault or negligence is nowhere a consideration in the Act, the Government must make compensation payments in cases where it is not at all at fault, as recognized in the Senate Report on the bill which became law: "Perhaps one-half of the accidents occurring under the present complex industrial conditions is the result of fortuitous circumstances for which nobody is to blame." S. Rep. No. 515, 64th Cong., 1st Sess., p. 7. Congress did not try to provide a reward or windfall for unfortunate employees or their dependents, but merely sought to provide a floor below which their financial circumstances could not be depressed.[10] Thus, provision was made for reimbursement of the compensation payment whenever there was equivalent or greater recovery based upon "a legal liability upon some person other than the United States to pay damages therefor." Section 26 of the Act, 5 U.S.C. 776. In this fashion, the floor for payments was maintained, and a program was set up which would not be unduly costly to the

[10] The House committee evidenced concern that, if payment levels were too high, injured employees might thereby be induced to malinger. H. Rep. No. 561, 63d Cong., 2d Sess., p. 27.

United States, which is required to pay initially in every case regardless of fault."

c. Petitioner seeks now, on the basis of a unique circumstance, to undo the simple, certain, uniform, and litigation-free compensation scheme which operates completely regardless of fault, by making negligence a factor in the unambiguous reimbursement provisions of Sections 26 and 27 of the Act. Moreover, even though there was no adjudication of negligence on the part of the United States in the present case (see the Statement, *supra*, p. 5), petitioner would have this Court regard as "binding" on the United States certain determinations of negligence in other cases in which the United States was a party (see footnotes 2 and 8, *supra*), even though Section 201(b) of the Compensation Act (5 U.S.C. 757(b), *supra*, pp. 2–3) expressly precludes her from directly

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" Both the opinion of the dissenting judge (Pet. App. A, p. 11a) and the petitioner (Pet., p. 9) note the apparent incongruity of the result of the decision below which permits the United States "to free itself of all financial responsibility" when it is jointly negligent with a third party, whereas it is burdened with all of the financial responsibility when it is solely at fault. The example is incomplete, and ignores the fact that the United States must also pay when it is not at fault at all. The apparent incongruity would not arise if the Act's provisions were applied as Congress intended they should be, *i.e.*, *regardless of fault*. See *Dahn* v. *Davis*, 258 U.S. 421, 431, stating that comensation is "allowed wholly without regard to the negligence of the Government or its employees." Moreover, as the dissenting judge quickly notes by his suggestion that the funds should be returned to Eastern (Pet. App. A, p. 11a), the issue presented by these examples has more to do with possible questions of contribution or indemnity between Eastern and the United States, than with any question which petitioner can raise.

raising such an issue in judicial proceedings, and makes the terms of the Act her "exclusive" resource.

2. In *Dahn* v. *Davis*, 258 U.S. 421, 431, this Court, by stating that the aim of the Federal Employees' Compensation Act was to give compensation to Government employees who otherwise would be without remedy when injured by fault of the Government, thereby emphasized that cases covered by the Act might well involve the fault of the Government.

The Court further pointed out, however, that the Act was designed to compensate all employees injured in discharge of duty in an amount which was to be allowed wholly without regard to the negligence of the Government or its employees. The effect of the reimbursement provisions of Sections 26 and 27 of the Compensation Act was described by the Court in the following terms (258 U.S. at 430):

> Plainly, by these two sections Congress deals with the liability of persons *"other than the United States"* to employees entitled to compensation under the act, *not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made* and of indemnifying it against other amounts payable in the future [second emphasis added].

In other cases, in which reimbursement provisions of similar compensation acts have been interpreted, no court has ever allowed the double recovery which petitioner here seeks.[12] Thus, under the Longshore-

[12] In fact, judicially determined negligence of an employer has been held irrelevant to the requirement for reimbursement under compensation statutes closely similar to the federal act.

men's and Harbor Workers' Compensation Act, a compensation act closely similar in operation to the one in the present case, this Court specifically rejected the allowance of double recovery where an employer's negligence contributed to an employee's injury. In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, the injured employee, Hawn, sued the third-party tortfeasor, Pope & Talbot. The third party impleaded Hawn's employer, Haenn. The jury found that the third party was liable to the employee for negligence (as well as for the unseaworthiness of its ship), and that the employer had also been negligent. The district court entered judgment for the employee against Pope & Talbot, and the judgment was affirmed on appeal. The court also entered judgment for contribution against the employer in favor of the third party, but this judgment was reversed on appeal. This Court affirmed both of the circuit court's rulings against the third party.

In this Court, the third party, Pope & Talbot, contended, as does petitioner here, that the negligence of the employer barred the employer's recovery, through

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American District Telegraph Co. v. *Kittleson*, 179 F. 2d 946 (C.A. 8), (Iowa Workmen's Compensation Act); *Cyr* v. *F. S. Layne Co.*, 112 F. Supp. 526, 530–531 (D. Conn.) (Connecticut Workmen's Compensation Act). See also 2 Larson, *Workmen's Compensation Law*, Sections 71.00, 71.20, pp. 165–168. Larson states unequivocally that "it is not true in any jurisdiction having a third party statute that the employee may *keep* both recoveries" (*ibid.*, p. 167, fn.). When the question of permitting a double recovery came up in the hearings on the bill, and on the floor of the House, it was summarily rejected each time. Hearings on Federal Employees Compensation Before the House Committee on the Judiciary, 63d Cong., 2d Sess., Serial 16—Part 2, pp. 62–64; 53 Cong. Rec. 10910, 10912.

the employee, of the compensation outlay. The Court flatly rejected the contention (346 U.S. 411–412):

> Haenn has been making compensation payments to Hawn because of obligations imposed by the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* Hawn has agreed to refund these payments to his employer out of his Pope & Talbot recovery. Pope & Talbot contends that the judgment against it should be reduced by this amount. It points out that Hawn's verdict includes sums for past loss of wages and medical expenses which it is argued were the very items on account of which Hawn's employer paid him. *Consequently Pope & Talbot says that if Hawn keeps the money he will have a double recovery and that to allow him to repay Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries.* Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. [Emphasis added.]

Section 27 of the Federal Employees' Compensation Act, has the same "specific provisions" as does Section 33 of the Longshoremen's and Harbor Workers'

Compensation Act (44 Stat. 1440, 33 U.S.C. 933) with respect to recoupment. Under both, the employee may retain the advantage of the potentially greater recovery obtainable by suit or settlement against a third party, so long as the basic compensation outlay is credited to the employer.[13] Moreover, they both call for reimbursement of the compensation outlay in almost identical language. The language in Section 27 of the Federal Employees' Compensation Act is—"under circumstances creating a legal liability in some person other than the United States to pay damages therefor * * *" (see *supra*, p. 4), and the language of Section 33 of the Longshoremen's and Harbor Workers' Compensation Act is—"that some person other than the employer is liable in damages * * *." Since the latter language in Section 33 of the Longshoremen's and Harbor Workers' Compensation Act was held not to stand in the way of reimbursement to the employer even though the third party tortfeasor was not solely liable, the comparable language in Section 27 of the Federal Employees' Compensation Act should also not be held to stand in the way of reimbursement to the United States.

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[13] Under the Longshoremen's Act, the Court has made clear that the reimbursement scheme entitles the employer to receive the beneficiary's share of a third party recovery to the extent that it effects reimbursement of the compensation outlay. *Doleman, Administrator* v. *Levine*, 295 U.S. 221; *Czaplicki* v. *The Hoogh Silvercloud*, 351 U.S. 525, 531–532.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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